In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1105

ANTHONY HERBERT,
Petitioner,

vs.

BARRY LANDO, MIKE WALLACE AND CBS INC.,
Respondents.

Supreme Court, U. S.
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ON [redacted] A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK TIMES CO., THE MIAMI HERALD PUBLISHING CO., THE WASHINGTON POST COMPANY, NATIONAL BROADCASTING COMPANY, INC., THE TIMES MIRROR COMPANY, PHILADELPHIA NEWSPAPERS, INC., MINNEAPOLIS STAR AND TRIBUNE CO., DES MOINES REGISTER AND TRIBUNE CO., CHICAGO SUN TIMES, THE COURIER-JOURNAL AND LOUISVILLE TIMES CO., DOW JONES & COMPANY, INC., GLOBE NEWSPAPERS COMPANY, THE BERGEN EVENING RECORD CORP., INDIANAPOLIS NEWSPAPERS, INC., AMERICAN SOCIETY OF NEWSPAPER EDITORS, RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, NATIONAL ASSOCIATION OF BROADCASTERS, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMICI CURIAE, IN SUPPORT OF AFFIRMANCE

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TABLE OF CONTENTS

Table of Authorities

CASES

CONSTITUTIONAL AND STATUTORY AUTHORITIES

MISCELLANEOUS

In the Supreme Court of the United States

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INTRODUCTION AND INTEREST OF THE AMICI

The amici curiae or their members are publishers, broadcasters, and editors.

The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc., publishes The Miami Herald (circulation 404,101).

The New York Times Company publishes The New York Times (circulation 850,000; Sunday 1,400,000).

The Washington Post Company and its subsidiaries publish The Washington Post (circulation 561,640), The Trenton Times (circulation 74,000), The Everett (Washington) Herald (circulation 52,000) and Newsweek (weekly circulation 2,900,000) and own and operate four television stations.

National Broadcasting Company, Inc. operates national television and radio networks, and owns and operates television and radio stations.

Times Mirror Company publishes the Los Angeles Times (circulation 1,006,387).

The Courier-Journal and Louisville Times Company publishes The Courier-Journal (circulation 208,150), The Louisville Times (circulation 161,631), and The Courier-Journal & Times (Sunday circulation 345,052).

Des Moines Register and Tribune Company publishes The Des Moines Register (circulation 224,094), Des Moines Sunday Register (circulation 425,161), Des Moines Tribune (circulation 91,736), and the Jackson (Tenn.) Sun (circulation 31,315).

Minneapolis Star and Tribune Company publishes The Minneapolis Star (circulation 235,361), Minneapolis Tribune (circulation 224,412), and Minneapolis (Sunday) Tribune (circulation 610,408).

Philadelphia Newspapers, Inc. publishes The Philadelphia Inquirer (circulation 421,627) and the Philadelphia Daily News (circulation 220,000).

The Chicago Sun Times (circulation 611,135) is published by Field Enterprises, Inc.

Indianapolis Newspapers, Inc. publishes The Indiana Star (circulation 226,195) and The Indiana News (circulation 158,009).

The Bergen Evening Record Corporation publishes The Record (circulation 155,000) and The Sunday Record (circulation 202,000).

Dow Jones & Company, Inc. publishes The Wall Street Journal (circulation 1,541,821), Barron's National Business & Financial Weekly (circulation 215,817), and through its Ottaway subsidiary, nineteen daily newspapers (circulation 460,000), and owns and operates national and international news services.

Globe Newspaper Company publishes the Boston Globe (circulation 306,114), the Boston Evening Globe (circulation 160,569) and the Boston Sunday Globe (circulation 660,428).

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble), and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

Radio Television News Directors Association includes approximately 1500 members who are active in the supervision, gathering, reporting, and editing of news and other

information of public affairs broadcast throughout the nation.

The National Association of Broadcasters is a non-profit association of radio and television broadcast stations and networks. Its membership includes 2607 AM stations, 1981 FM stations, 557 television stations, and the major nationwide commercial broadcast networks.

The Reporters Committee for Freedom of the Press is a non-profit unincorporated legal defense and research fund devoted to protection of the First Amendment and Freedom of Information rights of working press personnel of all media.

The amici curiae regularly face the threat of libel litigation and have appeared before this Court in the landmark First Amendment controversies which govern the resolution of the issues in this action, *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) ("*Sullivan*"); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) ("*CBS*"); and *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) ("*Tornillo*"). All amici believe the enormous litigation costs generated by the unlimited discovery authorized by the District Court in this case impose a "fundamental chill" on exercise of the First Amendment freedom of the press. All amici submit such unlimited discovery is a dangerous governmental intrusion into all aspects of the editorial process, particularly where as here investigative reporting of national policy issues—a process lying at the core of the protection extended by the First Amendment—is involved. Use of judicial compulsion to expose all aspects of the editorial process undermines *Tornillo* and fractures the protection required by *Sullivan;* it is a direct attack on the interests of all amici. Amici believe there is no basis for the conclusion of the District Court, 73 F.R.D. 387 (S.D.

N.Y. 1977), that the discovery rules of the Federal Rules of Civil Procedure may be applied without regard to First Amendment interests. Amici believe the rejection of this conclusion by the Court of Appeals, 568 F.2d 974 (2d Cir. 1977), should be affirmed.

STATEMENT OF THE CASE

The Background

Petitioner Colonel Anthony Herbert became a central figure in a controversy of both national and international significance when he charged his superior officers with ignoring his reports of war crimes committed by United States forces in Vietnam. An Army investigation followed and dismissed these charges. All media reported the controversy. The issue of war crimes became the focal point of much debate throughout the world.

Colonel Herbert, who had been relieved of his command in Vietnam for "inefficiency" nearly two years prior to filing his charges with the Army's Criminal Investigation Division, made himself the focal point of the debate. He thus was conceded to be a "public figure" (73 F.R.D. at 391), as that term is explicated in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), and subsequent decisions of this Court applying *Sullivan* to "public figures". More than that, he was an important government official who precipitated one of the most significant national policy debates of our time.

Colonel Herbert appeared on television to tell his story; he was favorably interviewed and reviewed in *The New York Times* and in *Life Magazine*. He wrote, in collaboration with a New York Times reporter, the book SOLDIER which gave his side of the controversy.

As the debate developed, a question arose as to the veracity and reliability of Colonel Herbert. On February 4, 1973 CBS broadcast a segment of "60 Minutes" entitled "The Selling of Colonel Herbert". Much of the program was directed to an examination of the factual assertions of Herbert, his protagonists and his antagonists. The program also seriously questioned the validity of Herbert's claim that the army regularly covered up war crimes and called into question Herbert's assertion of the occurrence of a cover-up of war crimes. Mike Wallace was the principal program correspondent; Barry Lando was its producer. The segment was the product of an extensive investigation of Herbert's charges by Lando and Wallace. This extensive investigation was in turn related by Lando in "The Herbert Affair," which appeared in the May, 1973 edition of *Atlantic Monthly*.

The Discovery

The CBS telecast and the subsequent article were the basis of Herbert's libel action. By agreement of counsel, Herbert was to complete discovery of Lando, Wallace, and CBS before defendants' discovery of Herbert would commence. Herbert's discovery was massive. Lando's deposition alone, extending from August 1, 1974 through September 26, 1975, ranged over some 26 volumes running to approximately 3,000 pages and 240 exhibits. Thousands of pages of documents were produced; screenings of the segments and filmed interviews were arranged.

Herbert inquired into Lando's knowledge, discussions, interviews, sources, and many other areas of the investigative and production process. Defendants provided all requested material, incurring tremendous expense and sacrificing countless man-hours. This federal diversity action, with the attendant power to utilize the Federal

Rules of Civil Procedure to coerce virtually unlimited discovery, served to immobilize one of CBS' leading investigative news teams for more than a year.

Defendants declined to provide information only when Herbert's discovery turned from the broadcast to the underlying editorial judgments in questions summarized by the Court of Appeals as concerning:

1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the "60 Minutes" segment and the *Atlantic Monthly* article;
2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
5. Lando's intentions as manifested by his decision to include or exclude certain material.

568 F.2d at 983.

The District Court

The District Court issued a sweeping opinion which ruled First Amendment interests irrelevant to defining the scope of permissible discovery in a *Sullivan* libel action. The court ordered the defendants to respond to virtually all of Herbert's controverted discovery requests, having concluded the heavy burden placed upon *Sullivan* plaintiffs required a liberal reading of the discovery rules. The

District Court dismissed *CBS* and *Tornillo*, which mandate virtually absolute protection to the editorial process of the press, as irrelevant: "hav[ing] nothing to do with the proper boundaries of pre-trial discovery in a defamation suit . . . ." 73 F.R.D. at 396.

The Court of Appeals

The Court of Appeals reversed the District Court, 2-1, with Chief Judge Kaufman and Judge Oakes comprising the majority and concluding First Amendment interests must be given effect in determining the appropriate scope of the discovery process. Both judges recognized a First Amendment right to protection against forced disclosure of a journalist's exercise of editorial control and judgment. 568 F.2d at 975.

Judge Kaufman viewed this Court's decisions as "repeatedly recogniz[ing] the essentially tripartite aspect of the press's work and function in: (1) acquiring information, (2) 'processing' that information, and (3) disseminating that information." 568 F.2d at 976. This case dealt with the second function, the editorial process. Citing *Tornillo* and *CBS*, he observed:

> The media is not a conduit which receives information and, senselessly, spews it forth. The active exercise of human judgment must transform the raw data of reportage into a finished product. The Supreme Court cases which grant protection to the editor so shaping the news are unequivocal in their terms.
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> * * *
>
> The unambiguous wisdom of *Tornillo* and *CBS* is that we must encourage, and protect against encroachment, full and candid discussion within the newsroom itself.

568 F.2d at 978-79.

Noting *Sullivan* stands for the principle that defamation actions must not be allowed to interfere with the "robust and uninhibited debate of public issues", Judge Kaufman concluded:

> . . . we must permit only those [discovery] procedures in libel actions which least conflict with the principle that debate on public issues should be robust and uninhibited. If we were to allow selective disclosure of how a journalist formulated his judgments on what to print or not to print, we would be condoning judicial review of the editor's thought processes. Such an inquiry, which on its face would be virtually boundless, endangers a constitutionally protected realm, and unquestionably puts a freeze on the free interchange of ideas within the newsroom.

568 F.2d at 980.

Since "the *ratio decidendi*" of *Sullivan* "is the concern that the exercise of editorial judgment would be chilled" (568 F.2d at 980) and the "lifeblood of the editorial process is human judgment" (568 F.2d at 984), Herbert's questions, which sought to make a decision-by-decision analysis of the process of reaching that judgment, could not be tolerated under the First Amendment.

Judge Oakes agreed limits must be set in *Sullivan* cases "on the untrammeled, roving discovery that has become so prevalent in other types of litigation in today's legal world." 568 F.2d at 985. He noted the Federal Rules specifically limit discovery which would oppress or burden a deponent (Rule 26(c)) or would compel discovery of privileged material (Rule 26(b)(1)). After considering the various alternatives, he decided the press clause of the First Amendment required "the conclusion that the editorial process is subject to constitutional privilege

and that actual malice must be proved by evidence other than that obtained through compelled disclosure of matters at the heart of the editorial process." 568 F.2d at 992. Noting actual malice which could be proved in any number of ways without intruding into this process, he concluded the First Amendment must limit discovery:

> . . . permitting compelled discovery of the editorial process would indubitably increase the level of chilling effect in a way ostensibly not contemplated by *Sullivan*. Thus, it is one thing to tell the press that its end product is subject to the actual malice standard and that a plaintiff is entitled to prove actual malice; it is quite another to say that the editorial process which produced the end product in question is itself discoverable. Such an inquiry chills not simply the material published but the relationship among editors. Ideas expressed in conversations, memoranda, handwritten notes and the like, if discoverable, would in the future "likely" lead to a more muted, less vigorous and creative give-and-take in the editorial room.

468 F.2d at 993-4.

Finally, Judge Oakes set out the scope of required protection. While case-by-case development of the "editorial process concept" would be required, the starting point had already been identified by Chief Justice Burger in *Tornillo*:

> [T]he choice of material to go into the broadcast, "the decisions made" on the duration and "content" of the broadcast, and "treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment," 418 U.S. at 285, thus, *Tornillo* mandates that the mental processes of the press regarding "choice of material," duration, and "content" of the broadcast are to be protected from scrutiny.

Id. at 995.

The Court of Appeals' majority thus held the press clause proscribed the compelled disclosure of the editorial process in a *Sullivan* libel action.

SUMMARY OF ARGUMENT

This case poses the issue of whether compelled discovery into the editorial process in a *Sullivan* libel action is consistent with *Sullivan's* protection of the uninhibited, robust, and wide open discussion of public affairs and the protection of the editorial process presaged in *CBS* and mandated in *Tornillo*.

Sullivan speaks to society's basic interest in robust debate on public controversies. To protect the press against libel actions by public officials, *Sullivan* erected the "actual malice" standard. Recognizing that it is not only individuals in government whose activities merit public attention, this Court subsequently extended the "actual malice" standard to "public figures". To underscore the importance of this protection, this Court required the libel plaintiff in a *Sullivan* case to meet a burden of proof of "clear and convincing evidence". Lower courts, elaborating on this Court's initial procedural protection, have made summary judgments the "preferred rule" in *Sullivan* actions. By contrast, the District Court here effectively shifts the "burdens" of litigation to the defendant, ignoring the constitutional protection announced in *Sullivan*. In reversing, the Court of Appeals construed the discovery rules to accommodate First Amendment interests.

As the Court of Appeals recognized, compelled discovery of the editorial process in a *Sullivan* case must be barred as an abridgement of fundamental First Amendment protection, since:

(1) Untrammeled discovery into the editorial process with its enormous pre-trial litigation costs, impermissibly burdens the exercise of First Amendment rights. Such discovery will inevitably dampen debate, because editors can be expected to allocate resources to the reporting of news less likely to incur such financial burdens. As a result, the *Sullivan* rule will chill rather than foster debate and discourage the exercise of the press' "checking function."

(2) Compelled discovery permits disgruntled public figures to convert *Sullivan* libel actions into retaliatory actions against the press, thereby effectively reviving the threat of "seditious libel" *Sullivan* sought to extinguish. The public figure's capacity for self-help minimizes his general need for a libel action to preserve reputation. Yet with wide ranging discovery available, a trial judge will normally be unwilling to dispose of a complaint by summary judgment until the official has completed discovery.

(3) Compelled disclosure of the editorial process directly chills and hamstrings the press' ability to perform its First Amendment function by exposing complex and sensitive deliberations to public scrutiny. Since editorial decisionmaking depends on candor and objectivity, as well as the protection of sources and concealment of targets of investigative reporting, exposure must induce self-censorship. Furthermore, cases would be decided on the basis of a jury's evaluation of the precise kinds of editorial judgments and statements of opinion protected by *Tornillo* and other decisions of this Court.

In contrast to the damaging effects on First Amendment interests of permitting compelled discovery into editorial decisionmaking, the impact on public figure libel plaintiffs of denying such discovery is slight. This Court therefore should affirm the judgment of the Court of Appeals recognizing, in a *Sullivan* action, an absolute privilege from compelled discovery into the editorial process.

ARGUMENT

I. Under the First Amendment Defendants may not be Compelled to Disclose Their Editorial Processes in a *Sullivan* Rule Libel Action.

A. The First Amendment Preserves The Free Press As one of the "Great Bulwarks of Liberty".

Freedom of the press is protected by the press clause[1] of the First Amendment. As James Madison's original draft of the First Amendment shows, that clause secures the press as a separate protector of liberty and is not merely a redundancy to the speech clause:

> "The people shall not be deprived nor abridged of their right to speak, to write, *or to publish their sentiments, and freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.*" I Annals of Cong. 451 (1789),

quoted in *First National Bank of Boston* v. *Bellotti*, 98 S.Ct. 1407, 1428, ftn. 4 (Burger, C.J., concurring) (emphasis sup-

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1. "Congress shall make no law . . . abridging the freedom . . . of the press. . ."

plied); see also LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 49 (1963).[2]

As Justice Stewart recently observed:

> That the First Amendment speaks separately of freedom of speech and freedom of the press is not constitutional accident but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively.

Houchins v. *K.Q.E.D., Inc.*, 46 U.S.L.W. 4830, 4834. (June 26, 1978) (Stewart, J., concurring).[3]

Recent scholarly debate[4] supports the conclusion the press is a separate constitutional protector of liberty.

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2. The final version of the press clause reflects only stylistic, not substantive, changes from Madison's original draft. See *First National Bank of Boston* v. *Bellotti*, *supra*, 98 S.Ct. at 1428, ftn. 4 (Burger, C.J., concurring).

3. *Cf. First National Bank of Boston* v. *Bellotti*, *supra*, 98 S.Ct. at 1428 (Burger, C.J., concurring):

> "To conclude that the Framers did not intend to limit the freedom of the press to one select group is not necessarily to suggest that the Press Clause is redundant. The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs,[4] while the Press Clause focuses specifically on the liberty to disseminate expression broadly . . ."

4. Professor Thomas Emerson has observed "[H]istory is seldom simple or forthright. . . . It is by no means clear exactly what the colonists had in mind, or just what they expected from the guarantee of freedom of speech, press assembly, and petition." Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 UNIVERSITY OF PENN. L. REVIEW 737 (1977). Other commentators agree both that the history is obscure and the expressions of "Freedom of the Press" and "Freedom of Speech" have often been used interchangeably. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1963) 1974-77; LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON (1966); RUTLAND, THE BIRTH OF THE BILL OF RIGHTS (1955). Nevertheless, commencing with Mr. Justice

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Press freedom was not created to confer special privileges upon an "institutional" press or elevate businesses which publish to a "preferred status". Rather the press clause was intended to protect a set of constitutional processes, irrespective of who performs them. These processes are the right to gather news, information, and opinion; to edit the material gathered as seen fit; to publish the edited material; and to disseminate widely the product. Whether these functions are carried out by *CBS*, *The New York Times*, *The Greenbelt* (Md.) *News Review*,[5] the *Ocala* (Fla.) *Star Banner*,[6] or "the lonely pamphleteer,"[7] these processes are protected as a separate "great bulwark of liberty."

Footnote continued—

Stewart's speech at Yale Law School on the occasion of its sesquicentennial celebration, Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975) (arguing the press clause is a structural provision of the Constitution, according the press special protection), a scholarly debate has resulted in a general consensus the press and speech clauses reflect disparate foci: Nimmer, *Introduction —Is Freedom of the Press a Redundancy? What does it add to freedom of speech?*, 26 HASTINGS L.J. 639 (1975); Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975) (arguing the clauses should be read as having a common meaning); Bezanson, *The New Free Press Guarantee*, 63 VIRGINIA L. REV. 731 (1977) (arguing press clause should be construed similarly to the religion clauses in the First Amendment so as to mandate a wall of separation between press and state); Van Alstyne, *The Hazards to the Press of Claiming a Preferred Position*, 28 HASTINGS L.J. 761 (1977) (contending that extension to the press of special rights may cause the judiciary to impose on it concomitant duties converting it into a "public utility"). See also *Symposium First Amendment and the Right to Know*: Emerson, *Legal Foundation of the Right to Know*, 1976 WASH. UNIV. L.Q. 1; Gellhorn, *The Right to Know: First Amendment Overbreadth?* *Id.* at 25; Goodale, *Legal Pitfalls In The Right to Know*, *Id.* at 29.

5. See *Greenbelt Cooperative Publishing Association, Inc.* v. *Bresler*, 398 U.S. 6 (1970) (libel action by public figure against local weekly newspaper).

6. See *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971) (libel action by a public official against local daily newspaper).

7. *First National Bank of Boston* v. *Bellotti*, *supra* at 1429 (Burger, C.J., concurring).

This does not mean the press and speech clauses have totally disparate purposes. Both clauses protect expression. Newspapers and broadcasters editorialize and editorial judgments inherently involve expression of values. When newspapers and broadcasters engage in investigative reporting, the reporting, as here, normally results in expression of a point of view.

Nevertheless, the sweep of the press clause is broader than the speech clause, reaching, as Judge Kaufman observed below, not only expression, but all processes from information gathering to dissemination of the "processed" result. And this broad sweep carries out the Framers' concept of the basic function of the press as a check on governmental abuse.[8] This "checking value," furthered by

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8. The exact historical purpose of this one "great bulwark of liberty" cannot be determined. Professor Vincent Blasi, in a recent exhaustive study, has shown that one central aim of the Framers was to preserve the right of individuals and the press to publish opinions critical of governmental policy and to seek to expose governmental corruption and abuse. Greatly influenced by Cato, Father of Candor, and Junius, the Framers thus saw protection of news processes as an institutional check on government. Blasi states the "checking value" is the value that "free speech, a free press, and free assembly can serve in checking the abuse of power by public officials." Blasi demonstrates the Framers expected both free speech and freedom of the press to perform this function. Once again, only the focus on the processes involved differentiate the clauses. Blasi *The Checking Value Of The First Amendment*, AMERICAN BAR FOUNDATION RESEARCH JOURNAL 521, 527 (1977). See also BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 36 (1967); CHAFEE, FREE SPEECH IN THE UNITED STATES 21 (1969). Shortly after the First Amendment was adopted its content was considered to mean "free government depends for its very existence and security on freedom of political discourse." LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON, *supra* at LXXVI. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965); Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 246; Meiklejohn, *What Does the First Amendment Mean?* 20 U. CHI. L. REV. 461 (1952-53); MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Brennan, *The Supreme Court and the Meiklejohn In-*

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reporting of the type here involved, requires a press right to freely investigate, evaluate, and criticize government policy to expose government corruption and abuse. This in turn necessitates a press right to investigate and evaluate those, like Herbert, who publicly charge government with wrongdoing. This Court has repeatedly recognized this "checking value" of the First Amendment's press protection. *Near* v. *Minnesota*, 283 U.S. 697, 719-20 (1931); *Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1966); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975); *Nebraska Press Assoc.* v. *Stuart*, 427 U.S. 539 (1976).

To buttress the "liberty" guaranteed by the press clause, private individuals must be allocated the right to decide what information to publish as "newsworthy" and what information is relevant to decisionmaking. The exercise of this power to determine the form and substance of expression is the editorial process. As life and government both become increasingly complex and the need of individuals for information increases at a geometric rate, the time individuals possess to digest news and opinion decreases. The balancing implicit in editorial decisions becomes crucial, and the freedom to pursue one's self-

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Footnote continued—

terpretation of the First Amendment, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note On The Central Meaning Of The First Amendment*, 1964 SUP. CT. REV. 191 (1964). Professor Blasi notes a number of significant differences between the "checking value" and the Meiklejohn theory. Blasi, *supra*, 558-64. The "checking value" is less absolutist, does not claim to be exhaustive of other First Amendment interests, and "focuses on the particular problem of misconduct by government officials." *Id.* at 558. Also it was clearly in the minds of the Framers of the First Amendment at the time of its drafting and ratification. The Meiklejohn theory would protect all expression useful to self-government, but not private expression. The material constituting the predicate of this libel suit would be protected under either theory.

interests in all areas of life depends on information.[9] ". . . [P]eople will perceive their own best interests if only they are well enough informed. . . ." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Protection of the editorial process, controlling the flow of information, its form and emphasis, is then, the cornerstone of First Amendment freedom, for government may not be allowed to dictate to the people what they should or should not know, or what they can or cannot express.[10] As *CBS* and *Tornillo* held the First Amendment denies government this power.

B. This Court Has Consistently Upheld the First Amendment's Protection of Press Processes.

The Framers' intent that the First Amendment should protect press processes so as to guarantee liberty has evolved, with the guidance of this Court, from the press clause's general concepts to modern conceptions appropriate to our complex society. Winter, *The Seedlings For the Forest*, 83 YALE L.J. 1730 (1974) (critical review of BERGER, EXECUTIVE PRIVILEGE); DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1977); Emerson, *Colonial Intentions. . ., supra;* Wellington, *Notes on Adjudication*, 83 YALE L.J. 221 (1973). The extent of this protection has increased from its least

9. That the interest in having information to make free choices sweeps more broadly than the interest in self-government is made clear both in the "commercial speech" cases, and in the "privacy" decisions (e.g. *Carey* v. *Population Services International*, 431 U.S. 678 (1977), striking down statutory prohibition on advertisements for contraceptives). Individual autonomy is what the First Amendment is more expansively perceived to protect. *Whitney* v. *California*, 274 U.S. 357 (1927); Blasi, *supra* at 544-48.

10. Such governmental paternalism was rejected by the First Amendment. *Linmark Assoc.* v. *Willingboro*, 431 U.S. 85, 97 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra;* BICKEL, THE MORALITY OF CONSENT 80-81 (1975).

sensitive aspect,[11] gathering of information, to its most, the editorial process and publication and dissemination of the published product. The latter have received virtually unrestricted protection.

The protections for the editorial process were fashioned in *Tornillo* and *CBS*.[12] So too with the right to publish free of prior restraint and unjustifiable subsequent punishment. *Nebraska Press Assoc.* v. *Stuart, supra*.[13]

This case will determine whether the absolute protection heretofore accorded the editorial process by this Court will continue. We know that subject only to the most narrow exceptions,[14] government may not tell editors,

11. Although newsgathering has been accorded the least protection of the various press functions, this Court has recognized the need to afford it some degree of protection. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). See also *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Houchins* v. *K.Q.E.D., supra; CBS Inc.* v. *Young*, 522 F.2d 234 (6th Cir. 1975); *Bursey* v. *U.S.*, 466 F.2d 1059 (9th Cir. 1972); Loveland, *Newsgathering: Second-Class Right Among First Amendment Freedoms*, 53 TEX. L. REV. 1440 (1974-75); Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 UNIV. OF PENN. L. REV. 166 (1975); Note, *Broadcasters' Newsgathering Rights Under The First Amendment: Garrett* v. *Estelle*, 63 IOWA L. REV. 724 (1978). There is a considerable body of law granting qualified protection, particularly against subpoenas. See Goodale, *Branzburg* v. *Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975). Many of the cases are collected in Goodale, *Subpoenas*, COMMUNICATIONS LAW 1977, 217 (P.L.I.).

12. See Abrams, *In Defense of Tornillo*, 86 YALE L.J. 361 (1976); *Cf.* SCHMIDT, FREEDOM OF THE PRESS VS. PUBLIC ACCESS (1976).

13. See also *Near* v. *Minnesota, supra; Landmark Communications, Inc.* v. *Commonwealth of Virginia*, 98 S.Ct. 1535 (1978); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1946); *Wood* v. *Georgia*, 370 U.S. 375 (1962). An unrestricted right to disseminate published material is also guaranteed. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Hannigan* v. *Esquire*, 327 U.S. 146 (1946).

14. Exceptions exist for those cases in which national security intrests are immediately, seriously, and irreparably threatened, *New York Times* v. *United States*, 403 U.S. 713 (1971); material that is obscene, *Miller* v. *California*, 413 U.S. 15 (1973); or material which invades privacy, *Cox Broadcasting Co.* v. *Cohn, supra*, or is libelous, *Sullivan*.

before or after the fact, what they must publish or what they may not publish. The question is posed whether this virtually absolute protection of the editorial process prohibits court orders compelling unlimited discovery into that process.

C. Compelled Discovery Into the Editorial Process in a *Sullivan* Libel Suit is Proscribed by the Press Clause.

In *Sullivan* this Court began the process of squaring the law of libel with the First Amendment to protect the "uninhibited, robust, and wide open debate" of public issues. To accomplish this purpose *Sullivan* established a substantive rule that a public official show "actual malice" as a predicate to a libel recovery. *Curtis Publishing Co.* v. *Butts, supra,* extended this rule to public figures.

But substantive rules were not enough to accomplish the purpose. Additional protections were also necessary, and the first of these was established by this Court, a heavy burden of proof for *Sullivan* rule libel cases—"clear and convincing evidence." *Garrison* v. *Louisiana,* 379 U.S. 64 (1964); *St. Amant* v. *Thompson,* 380 U.S. 727 (1968); *Monitor Patriot Co.* v. *Ray,* 401 U.S. 265 (1971). Lower courts have elaborated further protections. Thus in *Sullivan* rule libel cases, summary judgment has become the "preferred rule". *Time, Inc.* v. *McLaney,* 406 F.2d 565 (5th Cir.), *cert. den.,* 395 U.S. 922 (1969); *Washington Post* v. *Keogh,* 365 F.2d 965 (D.C. Cir. 1965), *cert. den.,* 385 U.S. 1011 (1967); *Guitar* v. *Westinghouse Electric Corp.,* 396 F. Supp. 1042 (S.D.N.Y. 1975). One more, and equally necessary, procedural protection was afforded by the Court of Appeals here.

Although *Sullivan's* test of knowing or reckless disregard of falsity focused on the subjective state of mind

of the libel defendant,[15] that test did not sanction a Star Chamber investigation of that state of mind. That sanction, if sanction there be, came from the recent extraordinary expansion of the discovery process. Discovery, wrought by the adoption of the Federal Rules of Civil Procedure in 1938 (and their subsequent amendments in 1946 and 1970),[16] has mushroomed in recent years. The combination of these events threatens to pervert *Sullivan's* attempt to protect "wide open" discussion of public affairs into a license for public officials to intrude into the editorial processes of the press merely by filing a libel action. If this Court is to continue to protect that kind of expression, it must do so through procedural protections adequate to the evolving need. Limitations on compelled discovery to protect the editorial process are a prime requirement, as the Court of Appeals here held.

1. Discovery Into the Editorial Process Generates Enormous Pre-Trial Litigation Costs Which Impermissibly Burden the Press.

The record of this case demonstrates the enormous pre-trial litigation costs a *Sullivan* plaintiff may inflict without ever obtaining a judgment on the merits and without any showing of constitutional libel. The deposition of Lando alone continued intermittently for over a year, filling 26 volumes and nearly 3,000 pages. Some

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15. Of course this Court could have protected untrammeled discussion by resolving *Sullivan* along other lines. The leading commentator in the field, Professor Emerson, believes the approach taken in *Sullivan* was inconsistent with the system of freedom of expression our nation requires. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 528-540 (1970).

16. See generally 4, 4A MOORE'S FEDERAL PRACTICE (1975). As Professor Moore notes, "Under the former practice at law there was no right to secure an examination of parties or witnesses before the trial solely for discovery purposes. . . ." 4 MOORE'S FEDERAL PRACTICE 719.

240 exhibits were provided. The expense of this discovery is only the "tip of the iceberg." The man-hours lost by Lando and his staff in preparing for, and providing, this discovery were perhaps even more costly to CBS. A leading investigative news team was effectively hamstrung by this discovery process. In addition, legal fees have been substantial. These staggering litigation costs have been imposed in the name of *Sullivan* despite that decision's intent to reduce the costs of "uninhibited, robust, and wide open" expression. The consequence of such costs, if permitted by this Court in the name of "liberal" discovery, can only be to chill such expression.

This case features the type of runaway discovery that has caused this Court and others to express grave concern about the continued utility of "liberal" discovery. As this Court observed in *Blue Chips Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975), enormous opportunity exists for "possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure."[17]

Libel plaintiffs may engage in broadbased "fishing expeditions" to force settlement. See *Hickman* v. *Taylor*, 329 U.S. 495, 507-08 (1947); 4 MOORE'S FEDERAL PRACTICE §26.55(1); 8 WRIGHT AND MILLER, FED. PRACT. AND PROC. §2007 at 39-40 (1970). Professor Moore has noted the increased use of discovery to inflict heavy costs upon opponents, particularly where there is little cause for fear of retaliation. 4 MOORE'S FEDERAL PRACTICE §26.02(3) at 26-68

17. To the same effect, see *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1082-83 (9th Cir. 1976), *cert. den.*, 430 U.S. 940 (1977); *Maheu* v. *Hughes Tool Co.*, 569 F.2d 459, 462 (9th Cir. 1978). See also Burger, *Agenda for 2000 A.D.: A Need for Systematic Anticipation*, THE POUND CONFERENCE, 70 F.R.D. 76, 95-96 (1976); Lasker, *The Court Crunch: A View From The Bench*, 6 F.R.D. 245, 249-50 (1977).

to 72 (2d ed. 1976).[18] Commentators agree no effective sanctions exist for discovery abuse. 4A MOORE'S FEDERAL PRACTICE §37.08 at 37-109-13; 8 WRIGHT AND MILLER, FED. PRACT. AND PROC. §2284 at 767-72.

When First Amendment interests are involved, abuse of discovery is more than a matter of concern; it is a violation of the Constitutional guarantee that exercise of First Amendment rights not be "chilled". This Court has repeatedly invalidated statutes and rules which *even tend to chill* the exercise of First Amendment rights.[19]

It is cruelly ironic that unlimited compelled discovery in the name of *Sullivan* and the attendant enormous pretrial litigation costs imposed could pervert that landmark decision by actually dampening debate. One would have thought this Court in *Sullivan* itself had already barred such a result:

> Would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court *or fear of the expense of having to do so.*

Sullivan, 376 U.S. at 279. (emphasis supplied)

To the same effect, see the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 52-53:

18. Comment, *Tactical Use and Abuse of Depositions Under The Federal Rules*, 59 YALE L.J. 117 (1949); Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132 (1951); Godofsky, *Protection of the Press From Harassment Under Libel Laws*, 29 UNIV. MIAMI L. REV. 462, 466 (1975).

19. *Elrod* v. *Burns*, 427 U.S. 347, 355-73 (1976); *Buckley* v. *Valeo*, 424 U.S. 1, 12-59 (1976); *Kusper* v. *Pontikes*, 414 U.S. 51, 56-61 (1973); *Healy* v. *James*, 408 U.S. 169, 181-84 (1972); *Lamont* v. *Postmaster General*, 381 U.S. 301, 305-07 (1965); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 544-50 (1963); *Talley* v. *California*, 362 U.S. 60, 64-65 (1960).

> It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to "steer far wider of the unlawful zone" thereby keeping protected discussion from public cognizance.

Lower federal courts have repeatedly recognized the need to short-circuit litigation costs and to procedurally protect the objectives of *Sullivan's* substantive rule. Summary judgment has been made the "preferred rule" in *Sullivan* cases.[20] The rationale was given in *Washington Post* v. *Keogh, supra,* 365 F.2d at 968:

> In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is "hardly less virulent for being privately administered."

20. *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858, 865 (5th Cir. 1970); *Time, Inc.* v. *McLaney, supra*, 406 F.2d at 566; *Wolston* v. *Reader's Digest Ass'n*, 429 F. Supp. 167, 179 (D.D.C. 1977); *Guitar* v. *Westinghouse Electric Corp., supra,* 396 F. Supp. at 1053; *Grant* v. *Esquire, Inc.*, 367 F. Supp. 876, 881 (S.D.N.Y. 1973).

Keogh was certainly correct in noting the disparity in financial ability of newspapers and broadcasters to face trial costs. Rampant discovery can place additional unacceptable costs on small newspapers and broadcasters. While the threat of enormous litigation costs may merely "chill" a decision by a large newspaper or broadcaster, these costs may threaten the continued existence of the small independent media enterprise and preclude any editorial decisions to engage in investigative reporting. In 1976 there were 7,579 weekly newspapers with an average circulation of only 5,015 and 1,512 daily newspapers with circulations under 50,000. Only 250 newspapers or 14.2% of total dailies, had circulation in excess of 50,000. AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, FACTS ABOUT NEWSPAPERS (1977). This Court recently recognized society's interest in preserving diversity of media expression through limiting industry concentration by rules against "cross-ownership". *F.C.C.* v. *National Citizens Committee for Broadcasting, et al.*, 98 S.Ct. 2096 (1978).

Prelitigation costs and litigation costs are, of course, added to the substantial expense of investigative reporting itself. In such reporting, the decision to incur that expense carries no guarantee of success. Investigative reporting is normally a commitment to the historic function of the press to check governmental abuse. The imposition of the additional financial cost of discovery abuse on the actual

expense of that editorial commitment may alone be sufficient to prevent the commitment entirely.

The decision by the Court of Appeals below to restrict discovery to preserve First Amendment interests was hardly the first to recognize the need to protect press rights thus imperiled.[21] The protection accorded by the Court of Appeals here is consistent with these discovery decisions as well as this Court's "clear and convincing evidence" rule and the summary judgment decisions of lower courts.

2. Discovery Into the Editorial Process Allows Public Figures to Convert *Sullivan* Libel Actions Into Retaliatory Vehicles Against the Press, Thereby Effectively Reviving the Threat of Seditious Libel Iaws.

Sullivan not only protected press commentary on public figures, it also reaffirmed this country's repudiation of seditious libel:

> If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystalized a national awareness of the central meaning of the First Amendment.

376 U.S. at 273.

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21. *Baker* v. *F. & F. Investment*, 470 F.2d 778 (2d Cir. 1972); *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. den.*, 409 U.S. 1125 (1973); *Gilbert* v. *Allied Chemical Corp.*, 411 F. Supp. 505 (E.D. Va. 1976); *Apel* v. *Murphy*, 70 F.R.D. 651 (D.R.I. 1976); *Apicella* v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975); *Loadholtz* v. *Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975); *Democratic National Committee* v. *McCord*, 356 F. Supp. 1394 (D.D.C. 1973).

The Sedition Act was a vehicle for public officials to retaliate against press criticism. *Sullivan* recognized that libel actions by public officials could be even more destructive of press freedom than such criminal libel statutes:

> Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms greater than those that attend reliance upon the criminal law".

Id. at 278. (citation omitted)

Curtis Publishing Co. v. *Butts, supra,* recognized the same consequence from public figure libel actions.

The public official figure already is capable of self-help, so his use of the libel action is often for the same destructive purpose as the criminal libel statute. As this Court observed in *Gertz* v. *Welch*, 418 U.S. 323, 344 (1974):

> The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs.

> He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties.

This case is a paradigm of the reason for the public figure rule: Herbert was able to fully present his version of this story through the use of all media. He would now use a *Sullivan* libel suit to attack the press because it responded to, and possibly refuted, his assertions.

This case demonstrates that unless abuse of discovery is eliminated, *Sullivan's* attempted control of libel suits may be obliterated. Herbert has sought to use discovery to punish the press for its presentation of a critical view of his actions. Unfortunately Herbert's efforts are not unique. *Cervantes* v. *Time*, *supra*; *Democratic National Committee* v. *McCord*, *supra*, are other examples of the threat of procedural abuse. Such tactics revive the threat once posed by the law of seditious libel and greatly undermine the "checking value" of the press.

3. Compelled Exposure of the Editorial Process Chills and Hamstrings the Press.

Editorial decisions are made in a complex assimilative process which seeks to identify and continuously refine "newsworthy" material, information, and opinion relevant to the public interest. Scarcity of press resources and audience time requires editors to establish priorities for, and allocate space or time to, news events. Analysis of "public interest" is invariably involved; a report's "effectiveness" or impact must be weighed. Timing may be crucial. The difficulties involved in this process of decisionmaking entails a great many implicit and explicit value-choices and reflect not only overt consideration of these factors but personal philosophies.

These complex and sensitive deliberations demand an atmosphere conducive to candor and creativity. Court-ordered scrutiny is the antithesis. Apprehension that decisions, opinions, and ideas expressed in the heat of editorial conferences will be subsequently exposed to public view can only inhibit free expression. In addition, exposure could reveal confidential sources,[22] newsgathering techniques, editorial strategies, and personal and political philosophies of editors.

This Court has long recognized the need to protect the candor and uninhibited decisionmaking processes of governmental bodies. As was observed in *United States* v. *Nixon*, 418 U.S. 683, 705 (1975):

> . . . the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

A common law privilege exists against probing the internal decisionmaking functions of government agencies.[23] *Morgan* v. *U.S.*, 304 U.S. 1 (1938); *Graham* v. *National Transportation Safety Board*, 530 F.2d 317, 320 (8th Cir. 1976); *National Courier Ass'n* v. *Board of Governors of Federal Reserve System*, 516 F.2d 1229 (D.C. Cir. 1975); *National Nutritional Foods Ass'n* v. *Food and Drug Administration*, 491 F.2d 1141 (2d Cir.), *cert. den.*, 419 U.S. 874

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22. The importance of protecting confidential sources has long been recognized. Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971); *Branzburg* v. *Hayes*, *supra*; *Baker* v. *F. & F. Investment*, *supra*.

23. Congress has also exempted certain internal governmental decisionmaking processes from disclosure under the Freedom of Information Act, 5 U.S.C. §552(b)(5).

(1974). This Court has also recognized the need to protect the mental processes of the judiciary. *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 684; *Pell* v. *Procunier*, *supra*, 417 U.S. at 834; *Houchins* v. *K.Q.E.D.*, *supra*, 46 U.S.L.W. at 4838-39 (Stevens, J., dissenting). Candor in the newsroom is equally necessary if the press is to probe government as the First Amendment conceived it should.

Furthermore, if the public figure may compel discovery of editorial decisions, a grave danger exists triers-of-fact will be encouraged to infer "recklessness" from discrete editorial decisions which they dislike. If the press assumes an unpopular position, as it may well have here, this likelihood is increased. For this reason Chief Justice Burger observed that editorial decisions are beyond the reach of government:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspapers or broadcast—can and do abuse this power is beyond doubt, but . . . calculated risks of abuse are taken to preserve higher values.

CBS, *supra* at 124-25. *Tornillo* confirmed this rule.

Tornillo teaches that no court, judge or jury, may tell editors how editorial judgments should be made or editorial opinions reached, any more than can a legislature. False statements are reviewable to the extent *Sullivan* permits. But editorial judgments are neither true nor false; as opinions, they are nonreviewable. If a judicial trier-of-fact would substitute its judgment for that of the editor, liability could attach to opinions. This Court has unequivocally precluded any such liability. *Gertz* v. *Welch*, *supra*, 418 U.S. at 339-40; see also *Buckley* v. *Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. den.*, 429 U.S. 1062 (1977).

4. The Impact on Public Figure Plaintiffs of Non-Discovery of the Editorial Process is Minimal.

There is no merit to the contention that a *Sullivan* libel plaintiff requires discovery into the editorial process to meet the "heavy burden" imposed by the actual malice standard. It is axiomatic there can be no direct evidence of an individual's state of mind; the inner state must be inferred from his behavior or conduct. This principle was recognized by this Court long ago:

> . . . while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. Of course we agree that the courts cannot "ascertain the thought that has had no outward manifestation." But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred. See 2 WIGMORE, EVIDENCE 3d ed. §§244, 256 *et seq.*

American Communications Association v. *Douds*, 339 U.S. 382, 411 (1950).

What is true generally of state-of-mind proof remains valid in libel actions. State of mind "is ordinarily inferred from objective facts". *Washington Post* v. *Keogh*, *supra*, 305 F.2d at 967-8. This Court notes in *St. Amant* v. *Thompson*, *supra*, evidence which would support an inference of actual malice:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published

> with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. 390 U.S. at 732 (footnote omitted).

While the illustrations may not be exhaustive, they are suggestive of the many methods available for proving actual malice which would not compromise First Amendment interests. None listed above requires disclosure of the editorial process.

What the Court of Appeals agreed should remain undiscovered was the editorial process—opinions and conclusions, the basis of the choice of material selected to include in the broadcast, the basis of decisions made with regard to the duration and content of the broadcast, the reasons for the treatment accorded public issues and officials, and discussions relating to themes which are an essential part of the process.[24] To the extent these questions explore matters of editorial *judgment*, they are not even relevant.

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24. While the exact scope of the protection afforded by the Court of Appeals may not be susceptible to expression in a "bright-line" rule, it is more ambiguous than protection already accorded the attorney/client relationship, 4 MOORE'S FEDERAL PRACTICE §26.60(2); matters affecting the public interest, 4 MOORE'S FEDERAL PRACTICE §26.60(3); and governmental papers, 4 MOORE'S FEDERAL PRACTICE §26.61(1) *et seq.*

Judge Oakes canvassed the consequences of denying Herbert discovery of the editorial process:

> "Actual malice can be proved in a number of ways. Logical inferences from the inconsistency, say, between a television program's content and contrary facts which a plaintiff might independently establish would provide an obvious starting point for such proof. Moreover, a plaintiff might adduce circumstantial evidence from participants or interviewees on the television program. In this case, for example, documents furnished under the Freedom of Information Act indicate that Lando's state of mind may be provable without directly impinging on the editorial process. While I offer no opinion on the admissibility or adequacy of this evidence to prove actual malice, it is clear that an editor's state of mind can be examined without discovering facts at the heart of the editorial process. Limiting discovery to those matters and persons not at the heart of the editorial process does not transform the *Sullivan* rule into a nullity for putatively libeled public figures. They can prove actual malice without endangering the editorial process which *Tornillo* held to be protected by the First Amendment.[31]

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31. "Limiting plaintiff's discovery concededly may deprive him of adducing the best proof of malice in the common law sense of ill will toward the plaintiff. But *Sullivan* itself distinguishes common law malice from actual malice. Limiting proof of actual malice as defined in *Sullivan* resembles other rules of evidence which limit the 'search for truth' in the interests of a higher social policy. See, e.g. Fed. R. Evid. 407, precluding introduction of subsequent remedial measures to provide negligence in order to encourage the promotion of safety."

568 F.2d 974, 993 (1977)

As Judge Oakes acknowledged, *some* effect may result from non-discovery. But that effect is only that the evidence to prove "actual malice" will be the kind of evidence normally used to prove "state of mind"—inferences from demonstrable fact. When this slight impact on the public figure libel plaintiff is balanced against the devastating consequence to editorial decisionmaking—itself the core of press freedom—surely the First Amendment must outweigh that impact.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of The New York Times Co., The Washington Post Company, The Miami Herald Publishing Co., et al., as Amici Curiae was served by mail this 31st day of July, 1978 upon the following:

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